In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1578

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

JOHN SYKES, #003316,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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TOPICAL INDEX

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 528 F.2d 522.

JURISDICTION

The judgment of the court of appeals was entered February 25, 1976 (A. 19-20). The Fifth Circuit denied a timely petition for rehearing en banc on March 22, 1976 (A. 21-22). The petition for writ of certiorari was filed on April 28, 1976, and was granted on October 12, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, Constitution of the United States (A. 50).

Amendment XIV, Constitution of the United States (A. 50).

STATUTE INVOLVED

Title 28 U.S.C. § 2254(a)(b) (A. 49).

COURT RULE INVOLVED

Florida Rule of Criminal Procedure 3.190 (1972) (A. 51).

QUESTIONS PRESENTED

1. WHETHER THE FAILURE TO QUESTION THE ADMISSIBILITY OF AN OUT-OF-COURT STATEMENT, AT OR BEFORE TRIAL, BARS A STATE PRISONER FROM PRESENTING HIS VOLUNTARINESS CLAIM IN A FEDERAL HABEAS PROCEEDING WHERE SUCH FAILURE CONSTITUTES A WAIVER UNDER STATE PRACTICE.

2. WHETHER JACKSON V. DENNO, 378 U.S. 368 (1964), MANDATES A VOLUNTARINESS HEARING WHERE

THE ADMISSIBILITY OF A CONFESSION IS NOT CHALLENGED.

STATEMENT OF THE CASE

In 1972, John Sykes was charged with second degree murder in DeSoto County, Florida. A jury trial was held and Sykes was found guilty of third degree murder. Sykes was sentenced to a term of ten years imprisonment in the state prison (A. 24).

During his trial, certain inculpatory statements made by him were introduced in evidence. Sykes never challenged the admissibility of the statements either at or before trial (A. 25). This constitutes a waiver of the issue under Florida practice. Sykes appealed his conviction but he did not raise the issue of the admissibility of his statements on appeal (A. 25). The judgment and sentence were affirmed.

Subsequently, Sykes filed a petition for writ of habeas corpus in federal district court challenging the admissibility of his statements. Sykes contended he had been too *intoxicated* to understand his "*Miranda*" rights (A. 25). An evidentiary hearing was held, but prior to the hearing Sykes executed a written waiver wherein he waived any contention that his state trial or appellate counsel were ineffective (A. 47).

At the evidentiary hearing, Sykes declined to present any testimony, relying entirely on the state trial record (A. 25). Wainwright (Florida) contended that Sykes had waived the right to present his "Miranda" claim because of his counsel's failure to challenge the admissibility of the statements (A. 25-26).

The district court ruled Sykes was not bound by his counsel's procedural default

and entered an interlocutory order giving Florida ninety days within which to conduct a *Jackson v. Denno*, 378 U.S. 368 (1964), voluntariness hearing (A. 23-31). (This order has been stayed pending appellate review).

Wainwright (Florida) sought permission and was granted leave to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Appellate Rules (A. 32-34). The Fifth Circuit affirmed, holding that Sykes' procedural default did not constitute a waiver even though Florida's procedural rule served a "presumably" legitimate state interest and even though Sykes never alleged or presented evidence of any cause excusing the failure to object (A. 1-18).

Wainwright petitioned the Court for a writ of certiorari and on October 12, 1976, the Court granted review.

SUMMARY

Florida practice requires that a challenge to the admissibility of a confession or admission be made either at or before trial. Failure to so challenge waives the issue. Sykes never challenged the admissibility of his inculpatory statements in trial court. Consequently, under the precepts of *Davis v. United States* Sykes' state procedural default forecloses the granting of federal habeas relief.

Fay v. Noia does not prohibit recognition of this waiver. There are many strategic and tactical decisions, with Constitutional implications, made by counsel, prepatory to and during the course of a trial, that do not require a *Johnson v. Zerbst* waiver. Procedural defaults resulting from these decisions are binding on a federal habeas petitioner in subsequent Title 28 U.S.C. § 2254

proceedings unless the habeas applicant demonstrates cause and actual prejudice excusing the procedural default.

The interpretation of *Jackson v. Denno* by the district court and the Fifth Circuit is erroneous. *Jackson* does not require a trial court to, sua sponte, conduct a voluntariness hearing absent a challenge to the confession. *Jackson* merely requires a forum whereby an accused challenging the admission of a confession can have that issue determined before the statement is submitted to the jury. Florida practice provides such a forum.

Absent a challenge to Sykes' out-of-court statement, a *Jackson* hearing was not mandated. The district court's interlocutory order, as affirmed by the circuit court, giving Florida 90 days within which to conduct a voluntariness hearing and

indicating that the court would grant the writ if a hearing is not held, is erroneous.

ARGUMENT

I

THE FAILURE TO QUESTION THE ADMISSIBILITY OF AN OUT-OF-COURT STATEMENT BARS A STATE PRISONER FROM PRESENTING HIS VOLUNTARINESS CLAIM IN FEDERAL HABEAS PROCEEDINGS WHERE SUCH FAILURE CONSTITUTES A WAIVER UNDER STATE PRACTICE AND WHERE THE HABEAS PETITIONER FAILS TO SHOW CAUSE AND PREJUDICE EXCUSING THE WAIVER.

A. THE STATE PROCEDURAL DEFAULT

Florida practice requires that a challenge to the admissibility of a

confession or admission be made either at or before trial. Failure to so challenge waives the issue. Florida Rule of Criminal Procedure 3.190 (1972) (A. 51), *Thomas v. State*, 249 So. 2d 510 (Fla. 3d Dist. Ct. App. 1971); *Blatch v. State*, 216 So. 2d 261 (Fla. 3d Dist. Ct. App. 1968). Sykes never challenged the admissibility of his inculpatory statements in state trial court. Consequently, at issue before this Court is whether Sykes' state procedural default forecloses the granting of federal habeas relief.

B. THE CONSEQUENCES OF THE DEFAULT UNDER A DELIBERATE BY-PASS ANALYSIS

In *Fay v. Noia*, 372 U.S. 391 (1963), the Court "...narrowly restrict[ed] the circumstances in which a federal court may refuse to consider the merits of federal constitutional claims"[1] in habeas proceedings.

1 Stone v. Powell, ___ U.S. ___, 49 L.Ed. 2d 1067, 1078, 96 S.Ct. ___ (1976).

The Court ruled that the federal district courts should entertain all habeas petitions raising federal questions. It gave district courts limited discretion to refuse to grant relief in cases where there had been a deliberate procedural default in state court. The Court turned to the waiver applied in *Johnson v. Zerbst*, 304 U.S. 458 (1938), as an appropriate benchmark, viz: that the habeas petitioner had intentionally relinquished or abandoned a known right or privilege.

Although *Fay* recognized that there would be other circumstances that would give rise to a waiver, *Fay* has been interpreted as recognizing state procedural defaults only where there has been a *Zerbst* waiver. This latter interpretation has resulted in some courts not only requiring a *Zerbst* waiver in all cases, but in placing the burden on the habeas respondent to demonstrate that

the habeas petitioner deliberately by-passed his state remedies, e.g. *Estelle v. Williams*, ___ U.S. ___, 48 L.Ed.2d 126, 143-144 (1976) (Brennan, J., dissenting); *Mottram v. Murch*, 458 F.2d 626, 629 n. 4 (1st Cir. 1972), rev'd, *Murch v. Mottram*, 409 U.S. 41 (1972). This interpretation has evolved because *Fay* made the exercise of the discretion to deny relief the *exception* rather than the *rule*.[2]

Sykes' case illustrates the consequence of this shift in burden. After being charged with murder in the second degree

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2 In fact, Johnson v. Zerbst places the burden on the habeas petitioner. Zerbst said: "...When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant without Counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel ...." 304 U.S. 458, 468-469 (1938).

he proceeded to trial, aided by counsel, without challenging either at or before trial the admissibility of his out-of-court statements. Sykes testified in his own behalf, but never, during that testimony, did he claim not to have understood his "Miranda" warnings. He appealed his conviction of murder in the third degree, but did not raise the admissibility of his statements in that appeal (A. 25). Sykes subsequently filed his petition in federal district court claiming his confession was involuntary because he was too intoxicated to understand his "Miranda" warnings. A hearing was held, but Sykes did not present any evidence; instead he relied entirely on the state trial transcript (A. 25). The lower federal courts did not require Sykes to prove that he had not waived his claim through procedural default. Ignoring the teachings

of *Zerbst*, which places the initial burden on the habeas applicant, n. 2, supra, they required Florida to prove that Sykes' procedural default was deliberate.

This is an almost impossible burden. Will the habeas petitioner admit that the by-pass was deliberate? Will his state trial counsel testify at the habeas hearing that his motive in not timely objecting was so he could have "two bites at the apple"?[3] If so, he may well have admitted to having violated his ethical responsibilities as an officer of the (trial) court. On the other hand, the decision of the Fifth Circuit in the instant case *would make a lawyer prima facie incompetent if he does timely challenge the admissibility of the confession!* He has nothing to

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3 See Arnold v. Wainwright, 516 F.2d 964 (5th Cir. 1975).

lose, and much to gain for his client, by not complying with a legitimate procedural rule, since he can always challenge it later in a federal forum if the verdict is adverse.[4] Under such an interpretation of *Fay*, it is petitioner who chooses when to litigate his constitutional claim while the state must be prepared to defend against that claim indefinitely.

C. CONSEQUENCES OF THE DEFAULT UNDER A CAUSE - PREJUDICE ANALYSIS

A *Fay-Zerbst* analysis is not the only criteria for determining when a procedural default would preclude a habeas applicant from presenting his constitutional claim in federal habeas proceedings. Procedural defaults by counsel, even without prior

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4 In retrospect it is clear why Sykes concedes his attorney was competent. His attorney foresaw what no one else could have: The Fifth Circuit's conclusion years after trial that pursuing state procedural rules was unnecessary.

consultation with the accused, may in some cases also preclude relief. This is clear from the Court's decisions in *Estelle v. Williams*, ___ U.S. ___, 43 L.Ed.2d 126, 96 S.Ct. ____ (1976); *Francis v. Henderson*, ___ U.S. ___, 48 L.Ed.2d 149, 96 S.Ct. ___ (1976); and *Davis v. United States*, 411 U.S. 233 (1973).

In *Davis*, the Court recognized that a failure to timely raise a substantive constitutional issue, as required by a rule of procedure, may constitute a waiver of that issue, precluding relief in subsequent habeas corpus proceedings. While *Davis* involved a federal prisoner collaterally attacking the racial composition of the grand jury that indicted him, this Court subsequently decided that "...considerations of comity and federalism require..." that the *Davis* waiver ruling should be applied to state prisoners as well.

Francis v. Henderson, ___ U.S. ___, 48 L.Ed. 2d 149, 96 S.Ct. ____(1976). In *Davis* and *Francis*, the Court ruled that the waiver could be excused where the habeas applicant demonstrated both *cause* and *actual prejudice*. Sykes has demonstrated neither.

D. RECONCILIATION OF APPROACHES

One would have to ignore reality not to recognize that there is tension between *Fay* and *Davis*. But they are reconcilable. *Fay* was concerned, primarily, with the *power* of federal courts to consider the merits of federal constitutional claims. *Davis* is concerned with the appropriate exercise of that power.

In *Fay* the Court held, inter alia, that:

> ...A choice made by counsel not participated in by the petitioner does not *automatically* bar relief.... 372 U.S. 391, 439, emphasis supplied.

That statement clearly infers that a *Zerbst* type deliberate by-pass is not the only instance where a procedural default would preclude subsequent habeas relief. *Davis* is a recognition of this interpretation.

If, for instance, the language in *Fay* had been "a choice made by counsel not participated in by the petitioner can *never* bar relief," the following cases would have been wrongly decided because each involved a tactical decision in which the habeas petitioner had not participated: *United States ex rel. Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973); *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2nd Cir. 1969); *Curry v. Wilson*, 405 F.2d 110 (9th Cir. 1968).

In *Twomey*, the court said:

> The Court's [*Fay's*] opinion emphasizes the importance of the defendant's participation

> in the waiver decision. It is worthy of note, however, that the Court did not say that a decision made by counsel, in which the defendant did not participate, can never bar relief. On the contrary, the Court stated only that such a decision "does not automatically bar relief." 372 U.S. at 439, 83 S.Ct. at 849. We infer that in some situations the acts of counsel, although not explicitly approved by the defendant, may fairly effect a waiver. 484 F.2d 740, 744

Accord: *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973).

Twomey and the above cases are consistent with the Court's pronouncements that a *Zerbst* waiver is not required in all situations involving constitutional implications. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court said:

> Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal

> defendant in order to preserve a fair trial.... 412 U.. 218, 237.

Examples cited by the Court in *Schneckloth* are: right to counsel, right of confrontation, to a jury trial, to speedy trial and to be free from double jeopardy. See also *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973). Strategic and tactical decisions preparatory to and during trial, even those with constitutional implications,[5] have been left to counsel. *Estelle v. Williams*, supra, n. 3.

E. APPROPRIATE ANALYSIS IN INSTANT CASE

The decision to challenge the admissibility of a confession is a strategic decision left primarily to trial counsel. *Twomey, Curry*, supra, *United State ex rel.*

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5 Strictly speaking, Sykes has not raised a constitutional deprivation. He has, instead, claimed non-compliance with the Miranda prophylactic rule. See Michigan v. Tucker, 417 U.S. 433 (1974).

Terry v. Henderson, 462 F.2d 1125 (1972)[6]

In *Twomey*, the Court stated the question to be:

> . . . whether petitioner waived his constitutional objection to the admissibility of certain evidence as a matter of Illinois procedure, and if so, whether that waiver also forecloses a federal collateral attack on his conviction. 484 F.2d 740, 741.

The evidence in *Twomey* was an in-custody statement. After finding the habeas petitioner's trial counsel to be competent and stating that he was bound by his counsel's trial tactics, the court said:

> . . . So analyzed, we are persuaded that the failure to object at trial to the admissibility of testimony describing petitioner's in-custody statement gave rise to the kind of waiver that should be placed in the same category

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6 This is apparent because on balance a confession may be more self-serving than prejudicial. It may raise a self-defense claim, an insanity claim or even arouse sympathy.

> as a "deliberate by-pass" of state remedies barring subsequent collateral attack in federal courts. 484 F.2d 740, 745.

The Fifth Circuit attempted to distinguish *Twomey* by stating that in *Twomey* the court found that there was a reasonable tactical basis for counsel's failure to object; whereas here the court found none. While we most respectfully disagree,[7] it should be observed that Sykes has conceded his trial counsel

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7 The Fifth Circuit was concerned with the statement made at the scene and not the one at the jailhouse. The court reasoned that initial statements were inconsistent with his self-defense theory at trial (A. 7, n. 4). The record indicates that Sykes came up the road after the officers arrived at the scene and said he shot the decedent (TR. 33 & 45). Such a statement was not inconsistent with his theory of self-defense because in self-defense a criminal defendant has to admit the act and then offer self-defense as an excuse for his act. Furthermore, it is manifest that, as Sykes' counsel obviously realized, the statement was not the product of a custodial interrogation. A "Miranda" warning was not required. Miranda v. Arizona, 384 U.S. 436 (1966).

was effective. If counsel was effective, a tactical purpose must be assumed.

Furthermore, a waiver resulting from a procedural default does not depend on subjective determinations. *Murch v. Mottram*, 409 U.S. 41 (1972). It makes no difference whether it was a "...defense tactic or simply indifference." *Estelle v. Williams*, ___ U.S. ___, 48 L.Ed.2d 126, 96 S.Ct. ____ , n. 9 (1976), as long as the facts and legal consequences were known or should have been known by the habeas petitioner's trial counsel.[8] Since Sykes did not present any evidence in the district court to show the decision was not

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8 Florida provides a post-conviction remedy for matters now known to the defendant. Fla. R. Crim. P. 3.850. While that procedure is not available for matters that could have or should have been raised at the trial court and on direct appeal it is available for matters not known to the defendant at the time of trial. State v. Matera, 266 So.2d 661 (Fla. 1972).

tactical, it should not be assumed to have been otherwise.

The approach in *Davis* is fair to both parties: where the state has a procedural rule, failure to timely raise a substantive constitutional issue, as required by the rule, may constitute a waiver of that issue precluding consideration of the federal question in subsequent habeas corpus proceedings, unless the petitioner demonstrates cause and actual prejudice.

The *Davis* waiver approach should be extended beyond the issues in that case. The policy considerations enumerated in *Davis* apply with equal force to "Miranda" claims.

Additionally, there is an even more compelling reason to apply a *Davis* waiver to "Miranda" claims such as this. The reason is suggested by Mr. Justice Marshall's dissent in *Davis*, wherein he comments:

> . . . But when a new trial is required so that an indictment may be returned by a properly constituted grand jury, those difficulties simply do not arise. Nothing in the previous trial must be redone; indeed, the prosecution could present its entire case through the testimony given at the previous trial, if it showed that its witnesses were now unavailable and thus that the alleged difficulties in reprosecution were real. * * * All that the prosecution might lose is the enhancement of credibility, if any, that the actual presence of the witnesses could lend their testimony. 411 U.S. 233, 250, citation omitted.

While Florida most respectfully takes issue with a position that places so little emphasis on the quality of evidence, it wholeheartedly agrees with the suggestion that there is considerable prejudice to the state where evidence is lost. With a "Miranda" claim of this nature, the state may never have an adequate opportunity to develop evidence to refute the claim. If

state witnesses are unavailable when the habeas application is entertained, previous testimony may be inadequate because it did not focus upon the precise issue.

F. APPLICATION OF THE DAVIS APPROACH TO THE INSTANT CASE

If the *Davis* waiver principles are applied in the instant case it is manifest that Sykes' claim should be denied.

(a) FLORIDA'S RULE SERVES A LEGITIMATE STATE INTEREST

The *Davis* approach naturally presupposes that the state procedural rule serves a legitimate state interest. Whether the rule does so serve is itself a federal question to be determined by the federal courts, *Henry v. Mississippi*, 379 U.S. 443 (1965); but in the instant case, the Fifth Circuit recognized that Florida's contemporary objection rule does and did serve a legitimate state interest (A. 12-13).

The policy considerations for recognizing such rules have been enunciated by the Court many times. *Davis v. United States*, 411 U.S. 233 (1973); *Henry v. Mississippi*, 378 U.S. 443 (1965); *Michel v. Louisiana*, 350 U.S. 91 (1955). The instant case exemplifies some of the reasons for Florida's rule. A timely challenge by Sykes would have put Florida on notice of the claim when Florida was best prepared to refute the contention. Florida could not possibly have anticipated the contention at trial because it was not until after his conviction and appeal that Sykes first suggested that he was too intoxicated to understand his "Miranda" rights.

(b) SUFFICIENCY OF CAUSE EXCUSING WAIVER

Sufficiency of cause should, of course, be considered on an ad hoc basis. Case

law has already isolated many factors that may be considered in this cause analysis: *Stone v. Powell*, ___ U.S. ___, 49 L.Ed.2d 1067, 96 S.Ct. ____ (1976) (state fails to provide opportunity for full and fair litigation of the claim); *Fay v. Noia*, 372 U.S. 391 (1963); *Aaron v. Capps*, 507 F.2d 685 (5th Cir. 1975) (grisly choice); *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973); *Wells v. Wainwright*, 488 F.2d 522 (5th Cir. 1973) (facts upon which substantive claim is based were not ascertainable by reasonable inquiry); *United States ex rel. Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973); *United States ex rel. Schaedel v. Follette*, 447 F.2d 1297 (2nd Cir. 1971); *Curry v. Wilson*, 405 F.2d 110 (9th Cir. 1968) (state trial counsel was ineffective).

It is perhaps redundant to repeat that Sykes has yet to suggest or demonstrate cause excusing his waiver. Until he does

so *Davis* precludes relief.

(c) ACTUAL PREJUDICE

Although Sykes did not demonstrate cause excusing the waiver, the Fifth Circuit refused to apply a *Davis* waiver under the assumption that Sykes had suffered prejudice. It said:

> ...in a case such as the present one, involving the admissibility of a confession or incriminating statement, prejudice to the defendant is inherent. A. 15

Florida most respectfully takes issue with this assumption. Concededly, in most cases an admission or confession is incriminating, but on balance it may not be prejudicial. To illustrate: a statement made by an accused that "I killed him, but in self-defense" is inculpatory, but not necessarily prejudicial. It might be, when considered with other evidence, more self-serving than incriminating. The

spontaneous statement made by Sykes at the scene that, "I shot Willie" (TR. 45) was not inconsistent with his testimony at trial that he did it in self-defense. Taken together they are not necessarily prejudicial. That an admission or confession cannot in all cases be presumed to be prejudicial has been recognized in many instances. *United States ex rel. Allum v. Twomey*, 48 F.2d 740 (7th Cir. 1973); *United States ex rel. Terry v. Henderson*, 462 F.2d 1125 (2nd Cir. 1972); *United States ex rel. Schaedel v. Follette*, 447 F.2d 1297 (2nd Cir. 1971); *Curry v. Wilson*, 405 F.2d 110 (9th Cir. 1968).

This Court held in *Davis* and subsequently in *Francis* that where there has been a procedural default, prejudice will not be presumed. The Fifth Circuit engaged in what this Court said not to do, i.e., it presumed prejudice.

II

JACKSON V. DENNO, 378 U.S. 368 (1969), DOES NOT MANDATE A VOLUNTARINESS HEARING WHERE THE ADMISSIBILITY OF A CONFESSION IS NOT A CHALLENGE.

The Fifth Circuit reasoned that if the trial judge had, on his own initiative, questioned the admissibility of the statement Sykes would have been put on notice as to his waiver rights. In placing this obligation on the trial judge it interpreted *Jackson v. Denno* as holding that a voluntariness hearing is mandated even where the voluntariness of a confession is not challenged.[9]

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9 The Fifth Circuit cites Stiner v. State, 78 Fla. 647, 83 So. 565 (1919), as authority for the proposition that it has long been the Florida practice to require a trial judge to satisfy himself that an admission or confession is admissible before submitting it to the jury (A. 9-10, n. 7). Whatever may have been the Florida practice

The lower courts misapprehended *Jackson*. In *Jackson*, the Court was concerned with the New York practice under which a question raised about the voluntariness of a confession resulted in submission of that issue to the jury together with the other issues in the case. The procedure violated the principle that a defendant is denied due process of law if his conviction is founded, in whole or part, upon an involuntary confession, since it would be impossible to determine whether the jury was influenced by the involuntary confession.

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in 1919, Fla. R. Crim. P. 3.190 (1972) now requires a challenge, otherwise it may constitute a waiver. It is for Florida to interpret its own laws as long as this interpretation does not violate constitutional principles. Garner v. Louisiana, 368 U.S. 157 (1961). Nevertheless, that part of Stiner relied upon by the Fifth Circuit was pure *obiter dicta* because the court in Stiner sustained the judgment since it found the admissions to have been voluntary.

The Court then held that a criminal defendant objecting to the admission of a confession is entitled to a fair hearing in which the confession's voluntariness is determined before its submission to the jury. The precepts of *Jackson* are satisfied as long as a forum is provided wherein a defendant challenging the voluntariness of a confession can have the issue resolved by the court as a matter of law. Florida provides such a forum through criminal procedure rule 3.190(i) (1972). *Land v. State*, 293 So. 2d 704 (Fla. 1974); *McDole v. State*, 283 So. 2d 553 (Fla. 1974).[10]

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10 Sykes "Miranda" claim cannot be presented via post-conviction relief in Florida because: "If the matter forming the basis of a motion to vacate was known to the defendant at the time of trial, it will not support a collateral attack on the judgment of conviction. This is true whether the matter was litigated at trial, as in the instant case, or withheld and not litigated at trial ...." State v. Matera, 266 So.2d 661, 661 (Fla. 1972).

Consequently his procedural default bars relief at this time.

The Constitution has never required more. In *Lego v. Twomey*, 404 U.S. 477 (1972), the Court recognized that the *Jackson* hearing was only mandated where the defendant challenges the confession when it said:

> In 1964 this Court held that a criminal defendant *who challenges* the voluntariness of a confession made to officials and sought to be used against him at his trial has a due process right to a reliable determination of that the confession was in fact voluntarily given and not the outcome of coercion which the Constitution forbids .... 404 U.S. 477, 478, emphasis supplied.

Similarly, the Court in *Pinto v. Pierce*, 389 U.S. 31 (1967), said:

> ...a defendant's constitutional rights are violated when his *challenged confession* is introduced without a determination by the trial judge of its voluntariness after an adequate hearing.... 389 U.S. 31, 32 emphasis supplied.

In support of its decision, the lower court relies on *Sims v. Georgia*, 385 U.S. 538 (1967). However, there the confession

was *specifically challenged* and the issue was whether the Georgia courts afforded a fair and reliable procedure for determining its voluntariness - not one of a sua sponte obligation on the part of the trial court to determine voluntariness.

The view that *Jackson v. Denno* does not mandate a voluntariness hearing when a defendant does not contest the voluntariness of a confession is generally accepted by lower federal courts. *United States v. Sabin*, 526 F.2d 857 (5th Cir. 1976); *Randall v. United States*, 454 F.2d 1132 (5th Cir. 1972); *Miller v. Cardwell*, 448 F.2d 186 (6th Cir. 1971); *United States ex rel. Lewis v. Pate*, 445 F.2d 506 (7th Cir. 1971); *United States v. Stevens*, 445 F.2d 304 (6th Cir. 1971); *United States v. Carter*, 431 F.2d 1093 (8th Cir. 1970); *Jacobson v. People of California*, 431 F.2d 1017 (9th Cir. 1970); *Sellers v. Smith*, 412

F.2d 1002 (5th Cir. 1969); *Garrison v. Patterson*, 405 F.2d 696 (10th Cir. 1969).

The Fifth Circuit's requirement that a trial judge should, on his own initiative, question the admissibility of a confession so that the accused will be on notice as to his waiver rights, ignores the distinction between the function of the court and that of counsel. The Court has guaranteed to all criminal defendants the right of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963). This guarantee is for the protection of the accused; but where the accused is represented by counsel, a court is entitled to rely on counsel to advise a defendant and to make timely assertion of his rights. *Estelle v. Williams*, ___ U.S. ___, 48 L.Ed.2d 126, 134, n. 4 (1976) (Powell, J. concurring). As stated in *Estelle:*

> ...Under our adversary system

> once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system. 48 L.Ed.2d 126, 135.

If counsel is incompetent, a criminal defendant has his remedies; but until he so claims a habeas applicant should generally be bound by his attorney's actions or inactions during the course of or preparatory to trial.

CONCLUSION

For the reasons indicated this petitioner respectfully requests the Court to reverse the holding of the Court of Appeals in and for the Fifth Circuit in this cause.

Respectfully submitted:

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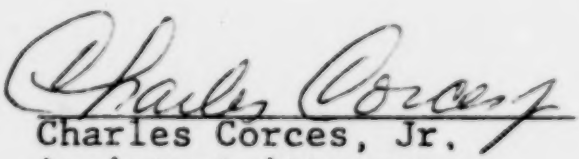
CERTIFICATE OF SERVICE

I. CHARLES CORCES, JR., Counsel for Petitioner, and a member of the Bar of the United States, hereby certify that on the 22 day of November, 1976, I served three copies of the Brief of Petitioner and three copies of the Appendix on William F. Casler, Esquire, 6795 Gulf Blvd., St. Petersburg Beach, Florida 33706, by a duly addressed envelope with postage prepaid.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